

## THE POLITICS AND IDEOLOGY OF THE PRISON CRISIS

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*After this article was written, a second wave of riots and hostage-taking occurred in Scottish prisons. This has not in the author's view materially affected his arguments.*

### 1. The Politics of Prison Secrecy

We are struck, first, by the loss of publicity which the transfer of the administration from local to central government has involved. Since 1878 the prison has become a "silent world", shrouded so far as the public is concerned, in almost complete darkness. This is due, in the first place, to the policy, to which every well-ordered administration is prone, of "No Admittance except on business". (Sydney and Beatrice Webb, 1922, pp.235-6)

Prisons may not deter too much crime but they certainly frighten off politicians. No Scottish Office Minister likes to say why in Scotland we send twice as many people to prison as they do down south. Are we more evil than the English or is the Scottish system unfair? The astute answer is of course another question: well what is *your* answer to the problem of law and order? The opposition retreats in embarrassed disarray. Better to call it a draw and in future to keep quiet. It seems the prisons must either force themselves onto the political agenda – literally, as we have seen so often this year – or be sacrificed in an expedient conspiracy of silence.

The politics of prison secrecy is by no means new. As long ago as 1922, Sydney and Beatrice Webb identified the system of central government control of the prisons introduced in 1878 and the consequent lack of public accountability as the two conditions, which allowed outsiders to be excluded and insiders to exercise their hidden powers beyond the public gaze. "Along with the practice of exclusion of the outsider," they wrote, "there goes an official policy of deliberate reticence, in order not to give any opportunity for troublesome questions to be raised in Parliament, and so as not to afford material for critical articles in the public press"<sup>(1)</sup>. The researches of John Howard and Henry Mayhew in the eighteenth and nineteenth centuries, they complained, would no longer be tolerated in the twentieth century "by the Home Office of today, on the ground that they would constitute an unnecessary interference with the official administration".

Times may have changed since the Webbs complained that inquiries into "alleged scandals" were held in secret and reports *never* published – although some cynics still share their worry that the "deliberate policy has been to ensure that the only source of authoritative information about what is going on in our prisons should be the series of annual reports by the Commissioners themselves, which naturally only tell the public so much of the facts as the Commissioners think to be, in the public interest, expedient"<sup>(2)</sup>. Access for independent research is still notoriously difficult to obtain and when it is obtained conditions are regularly imposed on publication. And there still appears some truth in the observation that "no person engaged in the administration is allowed to publish any book or article on the subject of his work without the permission and imprimatur of the Commissioners, which, as a rule, they appear reluctant to give"<sup>(3)</sup> – readers may recall newspaper reports of the difficult career of Mr Ken Murray's attempts to speak out on his experience as a prison officer in the Barlinnie Special Unit (*The Scotsman* 14.1.87).

But, even so, the absolute control over public information, policy making and resources inside the prisons, which typified the Scottish prisons' administration fifty years ago, is now under pressure – albeit largely from the inside. Since 1914, when the clandestine and illegal National Union of Police and Prison Officers was formed, an increasingly effective trade unionism has emerged, so that today the Scottish Prison Officers' Association (SPOA) is probably the most influential voice in prison affairs – both inside and outside the Scottish Office. Recently professional associations and representative organisations – such as the Scottish Prison Governors' Committee and the Prison Governors' Branch of the Society of Civil and Public Servants – have given increasingly public voice to grievances previously aired only in private. Less systematic but still effective has been the impact of the medical profession, social workers, psychologists and psychiatrists, whose professional allegiances outside the prison system have presented at least a limited challenge to the administrative priorities and bureaucratic orthodoxy described by the Webbs. The closure of the Detention Centre at Glenochil must, at least in part, be put down to the highly critical Chiswick Report (Scottish Office 1985).

Such developments are important but it remains the case that the politics of imprisonment in Scotland is still the preserve of a very few. Thus, for example – and really for much the same reasons that the Webbs gave – none of the political parties has a clear and identifiable analysis of why, in particular, Scottish prisons should have such an appalling record of riots, hostage-taking and disorder. Likewise, not one of the political parties – and this is true of the UK at large – has a clear and identifiable view of the purposes, effectiveness and future of imprisonment.

Fulfilling the Webbs' predictions, "prison reform" has thus become a classic example of the single-issue campaign, perceived by all concerned – by the participants as much as the MPs, journalists and the public – as a minority interest, outside mainstream politics. As a result, whenever a major incident occurs inside a prison, those who appear in the television debates or contribute articles such as this – whether as former prisoners, "campaigners", as prison staff or as Scottish Office civil servants – are almost without exception drawn from a very narrow community of activists, academics and other "prisons' professionals", who have little if any connection with the political system proper and as such are accountable to no one but themselves.

The word "community" is carefully chosen. Certainly each member of this community has a different corner to fight and allotted public role – the civil servant must shield the minister from political embarrassment, the civil libertarian reformer must represent the underdog, the academic should maintain distance and impartiality and so on. However, behind the sharp images and divisions that appear on our television screens, the reality is more truly represented as a sequence of dependencies and power relations, which still protect to great effect our prison secrets.

For example, state-subsidised voluntary organisations like SACRO (The Scottish Association for the Care and Resettlement of Offenders) are financially dependent on the Scottish Home and Health Department for funding, as are academic departments for research grants and access to information. Financial dependence of course need not spell political subservience but doubts – real or imagined – are always there. For example, academics are frequently involved with organisations such as the Scottish Council for Civil Liberties and SACRO, which have been critical of the Prison Department, which is a section of the Home and Health Department, which in turn funds the academics' research or even worse the research of their colleagues.

Add to this the fact that professional advancement in both the prison service and the SHHD is increasingly dependent on university qualifications – especially at the post-graduate level and frequently taught and examined by those same academics – and we have in effect what has become, whatever the appearances to the contrary, an extremely tight network of individuals with clear personal, institutional, professional and financial ties and obligations and in which questions of privilege and confidentiality, of conflicts of interest and professional advancement lurk awkwardly beneath ideals of the free exchange of knowledge, ideas and information.

Indeed, frequently I find myself trapped within precisely this same network of conflicting interests and values, in which obligations of confidentiality appear to be the price of acquiring the kinds of background

information essential to advancing understanding. This article is a case in point. Many of the propositions and empirical claims I make must, it seems be stated in general and unattributable terms. Permission to cite completed research has not been granted; thus the reader must take on trust what in other and better circumstances might have been backed by chapter and verse.

## 2. The Cycle of Crisis

The Scottish Prison Service carries out an onerous and often thankless task on behalf of the community and I believe there ought to be a proper recognition of their work in such difficult circumstances. (Mr Malcolm Rifkind, 6.5.87).

We have a double crisis in Scottish prisons. One is a crisis of ideals, the other is a crisis of control. The one has undoubtedly bred upon the other so that, without exaggeration, we now face the prospects of real and continuing trouble inside the prisons with apparently little genuine belief in the possibility of finding a solution. A culture of pessimism thus reinforces the politics of impossibilism.

There seems every reason to be pessimistic about the future of imprisonment. Both academic research and practical experience seem to lead to the same conclusion: prison does not work, or at least if it does, at enormous cost and with little certainty. It may be that some people will be deterred by the threat of imprisonment but we cannot say which ones. It may be that some will be rehabilitated but again we cannot say who they are. It may be that it is better to lock away and "incapacitate" those who are likely in the future to commit violent crimes but we have no way of predicting who will commit such offences<sup>(4)</sup>.

As research has thrown doubt upon deterrence, rehabilitation and incapacitation so it has become fashionable to fall back on the simpler and perhaps more appealing idea of "just desserts" and the proposition that people should be sent to prison simply as punishment for past offences rather than with a view to their future conduct and well-being. But then other uncertainties creep in. Why and when is prison "deserved" – rather than a fine, corporal punishment or a community service order, for example? And if prison is appropriate, what should it be like? Should the regime be punitive and hard or is the simple denial of liberty sufficient in itself? And finally, does the just desserts idea make sense when it seems people are more likely to commit further offences if they are sent to prison than if they are not?

In truth, the evidence on prisons is contradictory and bewildering. Advocates of one position or another can always find something in their support and if not they can always say that the evidence against them is true

only of the present situation and does not necessarily hold good for all time. In practice, however, the political impact has been definitive. In the face of such uncertainty and confusion, ideals have been abandoned<sup>(5)</sup>. In place of the rehabilitative ethic of prison rule 5 – "the purposes of training and treatment of convicted prisoners shall be to establish in them the will to lead a good and useful life on discharge and fit them to do so" – we now have an established "administrative penology", which prioritises what many practitioners and researchers believe always to have been the first but covert principle of prison administration, namely the control and processing of "bodies" within the prisons and thus the smooth running of the bureaucratic system.

From the point of view of those working within Scottish prisons there are two, working definitions of control, depending upon one's position within the administrative hierarchy. First, there is the view of the career civil servants in the central prisons administration (the Prison Department), whose primary role is to fine-tune the administrative structure rather than confront or solve the concrete problems of prison life and, according to some sources, above all to service the political master, the Secretary of State, and to ensure that he is not politically embarrassed. In the course of routine events, this would include avoiding undue public criticism of the system by those working within it – such as psychiatrists or the medical profession – and crucially by prison officers and SPOA. Indeed, it has been suggested that the power and influence of the SPOA within the prisons system rests upon a tradition within the Scottish Office of minimal confrontation and maximum accommodation to the wishes of the SPOA precisely in order to avoid the embarrassment of ministers.

From the point of view of those charged with the day-to-day running of a prison, however, control has a very different meaning. Where large numbers of prisoners associate, whether in the workshops or the wings, they necessarily outnumber staff and the immediate objective of control is, therefore, the smooth movement and processing of bodies through the institution with the aim of avoiding trouble and confrontation. It is generally recognised by prison staff that, for such purposes, the use of coercion as anything more than a remedy of the last resort is counter-productive. Indeed, a considerable body of research outside Scotland has shown that routine accommodations and negotiation of the formal rules between staff and prisoners – in dress or tobacco rations, for example – are common<sup>(6)</sup>. In Scottish prisons, however, while it is admitted that such practices have a place, it has been suggested that discipline is maintained, not through coercive sanctions, but through regimentation, organised movement, counting and assembly, which is intended to impose a psychology of order and deference to authority. In reality, therefore, for a period dating back decades rather than the last few years, the immediate demands of running the system – whether from the perspective of the civil servant or prison staff – have taken priority over what is now seen as the

“rhetoric of rehabilitation”.

More recently, however, control has broken down in both dimensions. There are two obvious and immediate reasons for this. First, in some prisons the infra-structure is literally collapsing – sanitation, accommodation and amenities in Victorian prison buildings – especially in the local prisons such as Saughton and Barlinnie – are now totally inadequate to cope with the number of bodies to be processed. (As I write, the Scottish Office has just announced a £6 million improvement scheme in Barlinnie). Secondly, in Scotland we have a rate of imprisonment about twice as high as England and Wales and which according to the most recent Council of Europe figures, is now the highest in Europe. However, it should be remembered that nearly three quarters of those who are sent to prison in Scotland are there either on very short sentences – as fine defaulters or for drunkenness offences – or on pre-trial remand. Not only does this mean that the local short-stay prisons are severely over-crowded, it also results in enormous pressure on the routine of these prisons and the work of prison officers, especially in terms of administrative duties involved in the constant turn-over of receptions and releases. In short, from the point of view of both prisoners and the staff, the fine social balance between formal control and informal accommodation and thus the possibility of a working consensus – however begrudging – has been all but collapsed, along with the buildings themselves. There is literally no room for manoeuvre.

As internal pressures on those working (and held) inside individual institutions have intensified as a result of social conditions and penal and sentencing policies, over which they have no control, so divisions between the central administration and staff “at the sharp end” have crystallised and become visible even from the outside. There are many examples. In December 1985 the Prison Governors’ Committee felt it necessary to write to the *Scotsman* complaining that the closed prisons were “so overcrowded that they are straining accommodation and staff resources to the limit” and that they were working under conditions that were “really not acceptable in modern society”. More recently and perhaps more unusual, the Scottish Prison Officers’ Association thought fit to join with the Scottish Council for Civil Liberties in writing to the Prime Minister, urging that a Royal Commission on Scottish Prisons be set up. Among their reasons, they stated “we are not satisfied that the (Prison) Department, with its present policies and obligations, will find a resolution of the crisis that we can accept in a civilised society”.

Such divisions and internal criticisms must not be put down simplistically to a failure of leadership or to the personal politics of those working within the Prison Department, however. It is a *structural* problem rooted firmly in the *centralised* administrative control of prisons, which is beyond scrutiny and effective accountability. In the crudest terms, among

the “community of prison professionals”, it is quite apparent that those who work full time in the prisons feel their own status and professional judgement is under-rated and frequently ignored by civil servants, whose long-term career patterns demand mobility between departments and who consequently have little understanding of the immediate problems of control and even less knowledge of the theory and practice of crime and punishment.

It is, in other words, a classic instance of bureaucratic goal displacement: decisions on the use of resources, the allocation of prisoners, staffing levels, conditions of work and “overall policy” are thus seen to be taken on criteria of bureaucratic efficiency. When as recently, both violent disorder and industrial action by staff have taken place, the response at the centre can be little else than crisis management and damage limitation. Inevitably, when such decisions are made behind the shield of “confidentiality” – and indeed the Official Secrets Act – interests of immediate political and administrative expedience take precedence.

### 3. The Failure of Ideals

It is said that Malraux saw as a key problem of our time whether it is “possible to pursue an active but pessimist philosophy that is not, in fact, a form of fascism”. This seems to encapsulate the problem for the prison service. The abandonment of the rehabilitative ethic has led to a widespread abandonment of hope. The somewhat chilling phrase “secure and humane containment” seems to command growing support as policy. The rehabilitative ethic, and perhaps still more, the liberal-reformism which preceded it, was an ethic of coercive caring; but at least there was caring. Will there be real care in the era of humane containment? (Professor Tony Bottoms, *The Coming Penal Crisis*, 1980).

The most significant response on the part of the Scottish Office to the steadily intensifying crisis of control in the eighties has been to increase the use of the coercive sanction to deal with “difficult and disruptive” prisoners. The cages and punishment blocks at Inverness and Peterhead are the most obvious examples. As was noted earlier, it is widely believed within the system that, simply in terms of “managing bodies”, such initiatives are counterproductive, as they disrupt the formal and informal systems of control by regimentation and negotiation. However, it is also very important to recognise that the number of “difficult” prisoners is in fact very small. The recent unpublished report of the Scottish Office Working Party on Alternative Regimes estimated on the basis of returns from prison governors that “there might be a total of around 250 such prisoners out of a population of approximately 3,000 convicted adult male prisoners”. However, the figure of 250 covers not only aggressive and what are termed subversive and uncooperative prisoners, it also includes

"inmates who challenge customary constraints by excessive use of normal channels of complaints"; "inmates who for personal reasons or because of the nature of their offence cannot be in normal association", and those "who for other reasons are at odds with the prison authorities".

In view of the breadth of these categories – not to mention the rather peculiar criteria employed – it is perhaps worth emphasising that the vast majority of prisoners – 92% on these figures – are *not* difficult or disruptive. It is, therefore, singularly disturbing but – in terms of the failure of policy and the failure of ideals, to which I have referred no longer surprising that the same working party should conclude that for the prison population *at large* "the concept of planned progression through the system was undermined by the lack of any coherent and consistent regimes, which might encourage prisoners to respond positively and behave well".

The failure of Scottish Office ministers and the Prison Department to confront the issues of penal policy directly has undoubtedly reinforced the double crises of control, which the prisons now face. The sense of frustration at Scottish Office inactivity, which at the time of the 1986 riots led to the deliberate leak to the press of the Working Party's report, is further intensified by the confusion of aims and the culture of pessimism, which appear to have taken root at all levels in the system. In recent months, this pessimism has surfaced in public in a debate over the future of rehabilitation, which at one point became so vitriolic that the Director of Prisons felt it necessary to threaten a journalist with legal action for misrepresenting his views (*The Scotsman*, 11.12.86).

Briefly stated, it is now maintained by many who work within the prisons that, as a matter of principle and law, the primary role of prison should be punish rather than rehabilitate; that, therefore, the role of prison staff lies properly within the criminal justice rather than the welfare system and that their function is to provide for the "secure and humane containment" of prisoners; that, especially given pressure on resources and the nature of imprisonment itself, the immediate and legitimate objective of staff must be the maintenance of order and control within the institutions. What was previously a tacit but tolerated working practice has thus been elevated to a statement of principle and policy.

At this point, however, opinion appears to split. On the one hand, there are the hard-liners who argue that effective containment and control demands restriction of association, the extension of formal sanctions and the further introduction of secure "segregation" or "control" units within the prisons. On the other side are the liberals, who maintain that "realistically" the best approach of the Prison Department and government would be to ensure that resources presently provided under the guise of rehabilitation are deployed simply to prevent deterioration of an individual as a result of the experience of imprisonment. Individuals should be

provided with opportunities for "self-improvement", their rights should be respected and regimes should be liberal and geared to consent rather than coercion. Critically, advocates of this position recognise that, if humane containment is to work, there must be a sharp reduction in the number of people sent to prison. Even so, they tell us, the best we can aim for is that people go out of prison no worse than they came into it.

In comparison to the current orthodoxy of the Prison Department, the liberal argument is undoubtedly attractive, principled and progressive. In America, in particular, it has a long and respectable philosophical pedigree and has been very powerful in countering the more bizarre and brutal arguments of the political Right. It is also, in my view, very dangerous.

The liberal critique of the rehabilitative ideal and of the so-called "treatment model" is well established in the literature. The principle of rehabilitation is said to be theoretically faulty and ultimately discriminatory because it assumes deficiencies either in the individual or in his or her upbringing rather than in social inequality, the class structure and so on. Secondly, it is said to deny both the rights and rationality of the individual in favour of a modern paternalist philanthropy based on a determinist conception of human nature and on a false belief in the scientific basis of medical, psychiatric and psychological practices. The logical outcome of this, it is said, is the indeterminate sentence, under which prisoners should be held until they are "cured". In practical terms the danger, indeed the demonstrable outcome, is that techniques of behaviour modification or drugs therapy, for example, are employed under the guise of rehabilitation of the individual when the real aim is to secure the docility of the prison population at large – that it is used as an illegitimate means of maintaining control. Finally, besides all this and more, there is the wealth of research evidence which, alongside recidivism rates upwards of 80%, shows beyond doubt that rehabilitation has in fact failed.

The trouble is that little of substance is offered in its place. For example, the so-called "justice model", espoused by most liberal critics of rehabilitation, promises the elimination of arbitrary discretion and the professional sorcery of the psychiatrist, the psychologist and the social workers. "Administrative justice" behind closed doors of the parole board, for example, would be abolished in favour of strict determinate sentencing in open court on supposedly self-evident principles of "justice" and "dessert". The rights and responsibilities of the individual prisoner would be respected and protected – after all, the prisoner has a right to be punished rather than to be put through the hoops of the treatment model like a rat in the psychologist's maze.

The irony is that, despite their origins in well-meant liberal reform, such criticisms and the alternatives such as they are, as Professor Bottoms predicted in 1980, are only too "easily capable of appropriation by the

Right, who have no difficulty with concepts of desert and equal sentencing, but would insist on *long* fixed sentences rather than the short fixed sentences proposed by justice model adherents<sup>(7)</sup>. Today, the reality is that when you throw out rehabilitation, you simply abandon people to their rights.

There are answers to the criticisms which are made of the rehabilitative ideal. First, to argue that rehabilitation is simply incompatible with the coercive structure of the penal system and should therefore be the function of a separate and distinct welfare system is to misunderstand the nature of welfare provision, which itself rests in significant part upon use of sanctions – the threat to take a child into care, for example. As such, there is no logical reason to argue that rehabilitation and the welfare of the prisoner cannot and should not be the primary aim of imprisonment. Rather, it is an argument made by those whose frame of reference is dictated by the immediate demands of prison management.

Secondly, the identification of rehabilitation with the medical model of treatment and cure is, without doubt, an accurate description of rehabilitation as it has been practised in prison – although notable exceptions to this would include the Barlinnie Special Unit. But to consign the ideal of rehabilitation to the dustbin of penal history would be like jettisoning education because of the teaching methods of Mr. Gradgrind or Jeremy Bentham.

Thirdly, and most difficult to argue succinctly, it is both politically and sociologically too easy to reject rehabilitation in prison as an instance of unwarranted paternalism or, alternatively, of the unwanted ministrations of “the nanny state”. Certainly, we must ask whether and under what conditions rehabilitation can best be achieved in prison; we should most certainly determine how and for what purposes it should and should not be undertaken in prison. But to say that rehabilitation does not and must not occur in prison is as daft as saying that socialisation does not and must not in schools, in families, in the civil service or, for that matter, in the Prison Department. In a broad sense rehabilitation in prison occurs, whether we like it or not. It occurs through the process of regimentation; it occurs through the informal negotiations and staff tolerance of rule-breaking by which the prisoner learns to play the system; most dramatically, it occurs in the production of recidivists. If, then, we are going to have prisons, we are going to have some form of rehabilitation, whatever the political, philosophical or sociological position of the critic. It remains a political question as to what ends rehabilitation serves and whether we choose to make those ends explicit.

#### 4. Somebody Else's Problem

“An SEP is something we can't see or don't see or our brain doesn't

let us see because we think that it is somebody else's problem. That's what SEP means. Somebody else's problem. The brain just edits it out, it's like a blind spot. If you look at it directly, you won't see it unless you know precisely what it is. Your only hope is to catch it by surprise, out of the corner of your eye.” (Ford Prefect in Douglas Adams, *Life, the Universe and Everything*.)

Derek McClintock, Professor of Criminology at Edinburgh University, has repeatedly and forcibly made the point that “prisons, except in a narrow administrative and technical sense, cannot be fruitfully considered in isolation from the substantive criminal law, the criminal justice process, sentencing principles and practice, and the nature and purpose of various non-custodial measures”. Furthermore, he adds, as the prison service is “part of the State bureaucracy... penal affairs are therefore part of the political process and cannot be divorced from the theory of the State”. To complicate matters further, he tells us that “the methods and practices of the prison service cannot be understood in isolation from the theories and explanations made as to criminal or deviant behaviour”<sup>(8)</sup>.

He is of course absolutely right. Any serious attempt to unravel the problems of Scottish prisons in the eighties would take us through the infinitely complicated chain which, depending upon one's view of the world, either links together a rational administration of justice or hangs like a deadweight about its neck of reform. By way of illustrating the problems it is worth considering the following example given by Elliott Currie<sup>(9)</sup>.

Suppose, Currie asks us, that state x imprisons a lot of robbers and has a low robbery rate, while state y puts proportionately fewer robbers behind bars and has a higher rate. Does this mean that the lower risk of imprisonment in state y is responsible for its higher robbery rate? Perhaps, he admits; but it could also mean that the high robbery rate in state y makes it hard to apprehend and convict robbers in the first place, and also makes it less feasible to send them, once convicted, to already overcrowded and volatile prisons. In which case, the crime rate isn't simply a response to criminal justice policies; to an important extent, the crime rate itself influences the effectiveness of the penal system.

Clearly, even in a simple example such as this, the interaction of penal policy, sentencing, policing and crime rates is far more intricate than appears on first sight. Yet, in a matter of hours after the riots last winter we had had all the answers – over-crowding, over-sentencing, insufficient resources, the failure of penal policy; inadequate social work funding, unemployment, educational deprivation, etc., etc. All of which appears to accord both with common-sense and empirical research. The trouble is that neither common-sense nor research are particularly helpful when we are confronted by a chain of decision-making and responsibility in which, it seems the buck is passed back through an ever widening circle.

What, for example, can the prison authorities or the Scottish Office do when the judiciary continues to incarcerate fine-defaulters (about 50% of all prison receptions in Scotland) and to remand those awaiting trial (20%) in preference to bail? But what can the judiciary do when crime is rising and social work departments are unable to fund alternatives to custody? What can the police or social workers do in the face of rising crime and cuts in public spending? But what can local or central government do when foreign multinationals disinvest and wreck the local economy? Ultimately, it is always somebody else's problem.

There is a reverse side to this. If the police arrest a young man and charge him with robbery, they know that it is the procurator fiscal's job to ensure that the prosecution is in the public interest. The fiscal knows that it is for the judge to determine whether or not a custodial sentence will be imposed. But the judge has the recommendation of the social work department and the social enquiry report to rely on and, if he then decides to imprison the offender, it is for the Prison Department to decide which prison to send him to and under what regime he should be held. Even then it is for the medical officer at the particular institution to determine whether he is fit in mind and body to undertake the rigours of, for example, the short, sharp, shock. At each point in the system, therefore, there are safety nets, but each net would appear to be torn. The hole in the net again is someone else's problem.

The institutional passing of the buck, which thus typifies the administration of criminal justice and the prisons in this country is perhaps less obvious than the problems of prison conditions, oversentencing and the funding of alternatives – and much more difficult to document. Nonetheless, it has further reinforced the crisis of confidence and imagination which now pervades both the prisons' bureaucracy and the political and intellectual world of prison reform.

Put very simply, as crime rises prison administrators are caught in yet another double bind. One moment they are accused of failing in their task – neither the deterrent nor the rehabilitative functions of prison are working. At the same time, more people are sent to already over-crowded prisons, so the less there is the possibility of rehabilitation and the greater the likelihood of more trouble. Understandably, those working within the system have become increasingly demoralised and defensive.

The problem is, of course, that where we have an advanced bureaucratic division of labour but inadequate accountability, crises – whether political, social or economic – can always be represented as somebody else's problem. This is even more likely when, as in the prison system, we are confused and uncertain about what it is that bureaucracy is meant to be doing. Is the object of imprisonment to deter and prevent

future crime? Is it to punish past offences? Is it to rehabilitate offenders or simply to hold them meantime so that, for a while at least, they cannot commit any more wrongs?

These problems are even further compounded when the public sees the prisons burning and prison officers held hostage. We naturally want to lay the blame at somebody's door – but whose? Few people would wish to make scapegoats of individual prison administrators, members of staff or even government ministers. Quite properly, but too readily where there is no effective system of accountability and review, in such circumstances, we accept the collective responsibility of officialdom – for unless decision-makers can be held to account, it seems from the prisoners' point of view that we have one law for the prisoner and another for the imprisoner. From this real problems flow.

Take, for example, the recent changes in the system of parole, introduced by the Secretary of State for Scotland in December 1984. Under his powers, Mr Rifkind announced that prisoners serving five years or more for violent crime or drugs offences would only qualify for parole where the circumstances were exceptional. Likewise in relation to life prisoners, he decided that only in exceptional circumstances would he consider release in less than twenty years where the sentence was for the murder of police or prison officers, murder by terrorists, sexual or sadistic murders of children or murder by firearm in the commission of crime.

This is an horrific catalogue of offences, for which longer sentences may or may not have the desired deterrent effect. What is at issue here, however, is the immediate effect this change of policy had on the prisons. From the point of view of both those already serving sentences and expecting to get parole and from the perspective of staff attempting to keep control of increasingly tense situation, suddenly the goal posts had been shifted. Thus, HM Chief Inspector of Prisons wrote earlier this year that, during investigation of the troubles at Saughton and Peterhead:

It became apparent to us that very many governors, staff and inmates had been shocked by and dismayed by this public announcement in December 1984. The prisoners felt unjustly treated in that the effect of the announcement was retrospective, that what they believed were realistic expectations had been thwarted and what light there had been at the end of the tunnel had been extinguished. They also felt that it was futile to apply, at least in the earlier stages of sentence, and that any faith they had had in the system had been destroyed. Staff on the whole felt that this change in policy could have been better managed, that prisoners in the system at the time of announcement had been dealt an unfair blow and that an attractive incentive, which often resulted in cooperation, had been removed in the early stages of a prisoner's sentence when the prisoner may be experiencing

difficult settling down.<sup>(10)</sup>

What doubtless had seemed to the Secretary of State a sensible measure designed to tackle violent crime in society thus appears to have had the effect of producing violent crime in the prisons. So much so that the Prisons' Inspectorate concluded that "the parole system must be reviewed in an attempt to restore confidence in it because, regardless of counter arguments, inmates and staff perceive the new policy as repressive and iniquitous".<sup>(11)</sup>

Despite the extraordinarily strong terms of this recommendation, it would seem that no public review of parole is planned and no doubt, at some point in the future, television studios will ring once again to the tones of "I told you so". But can anyone seriously say that Malcolm Rifkind is personally to blame for the particular actions of demoralised staff and prisoners in Scottish Prisons?

The sense of frustration of those within the community of prisons professionals is only intensified, however, when we read statements such as the following comment in a press release issued by Mr Rifkind in response to the Report on Peterhead Prison:

Prison regimes by their very nature will never be ideal for those who have grievously offended against society. It is my view that we have had, in recent times, too great a concentration of attention upon the criminal element. The lawbreaker does not have the sympathy of the population at large. Their support lies with the forces of law and order, and while the Scottish prison system is passing through a particularly trying period our support for them is not in doubt and never will be. (Scottish Office, 6.5.87)

Mr Rifkind is undoubtedly correct to point out that in Scotland we have spent too little time investigating criminal victimisation and the responses and attitudes of victims towards offences and offenders. For this reason it is much to be regretted that the Scottish Office decided not to participate in the second British Crime Survey undertaken in England and Wales in 1983/4. Thus, the only hard information we have on patterns of criminal victimisation in Scotland therefore dates back to the Scottish Office survey of 5,000 members of the public, which was completed in 1981.

This provided some extremely valuable information which, as it would seem to confound common-sense, demands careful analysis. For example, the Scottish Office researchers commented that "the reputation of Glasgow as a city with high rates of violent crime is not substantiated by the initial findings from the survey. For most types of assault – serious, common and sexual – the rates in Glasgow are equal to or less than the Scottish average".<sup>(12)</sup> More important in the present context was, to some no doubt,

the quite extraordinary finding that:

Although for most crimes, victims expressed a preference for involving the courts, there were few indications that victims expected harsh sentences for their offenders... Only 13% thought a prison or other custodial sentence was the most appropriate for the offender.<sup>(13)</sup>

## 5. What Is To Be Done?

The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of any country. A calm dispassionate recognition of the rights of the accused; a constant heart-searching by all charged with the duty of punishment; a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment; tireless efforts towards the discovery of curative and regenerative processes; unfailing faith that there is a treasure in the heart of every man; these are the symbols which in the treatment of crime and the criminal, mark and measure the stored up strength of a nation and are sign and proof of the living virtue in it. (Winston S Churchill).

It is now nearly seventy years since Churchill gave voice to such sentiments. In the meantime such attitudes have, it seems, fallen out of favour and the Scottish prisons have become bogged down in an administrative and political morass, which in fact has little if anything to do with the electorate and which will take the equivalent of a Royal Commission to sort out. It is hard to share the present Secretary of State's view that such a body will take "too long to report to be of use". Clearly, we need the evidence and research that a Royal Commission would be empowered to collect, while the inherent advantage of such a strategy lies in depoliticising what would otherwise become an overtly party political wrangle over the failures or otherwise of government policy.

A Royal Commission might begin by asking such questions as why it is in Scotland the judiciary send so many more people to prison for comparatively trivial offences than, for example, in England and Wales. But very soon it would find itself on the track of somebody else's problem. Ultimately, it would have to confront the basic problem of accountability posed so long ago by the Webbs and, more specifically, the relationship between the purposes of the modern institutions of the criminal justice, welfare and penal systems.

For many people, the idea of political accountability in the area of welfare, policing or prisons is anathema. The social worker or psychiatrist, for example, is immediately concerned with issues of confidentiality, trust and professional ethics. The civil libertarian can share with the politician



the fear of a political police force and totalitarian visions of prison camps and closed "psychiatric" wards. With apologies for going over well-trodden ground, therefore, it is as well to restate the essential reasons for accountability in the criminal justice system.<sup>(14)</sup>

First, in relation to criminal justice, political accountability – whether of the police, the prisons, or even the judiciary – in no sense should be equated with political control. Professional autonomy, negotiation and judgement in the particular case – as we have seen in relation to prison staff but equally for the judge, the social worker or the police officer – is not only inevitable but desirable in the interests of substantive justice. However, the exercise of discretion must always occur within the prescribed limits of the law, which in no circumstances should be subject to retrospective change. In that sense, direct political control by administrative fiat – such as Mr Rifkind's change in the parole system – is not only undesirable and counterproductive; it is totally incompatible with the rule of law and the principles of democratic accountability.

Secondly, political accountability refers to the formulation of future policy rather than legal responsibility for past actions. It is, or rather should be, for the legislature to determine the legal limits of discretion and for the courts to decide whether or not an official has acted within those powers. But it is surely for elected representatives in their executive capacity – whether at local or national level – to provide clear guidelines and policy directives on how and to what ends those powers are to be exercised in the particular case. For example, it is a question of law whether an individual prisoner has been mistreated by a particular prison officer; it is a matter of policy whether punishment blocks – such as the cages in Inverness – should be built in the first place and how disciplinary regimes should operate.

Third, and following from this, the purpose of political accountability is to hold up to public review and scrutiny the collective responsibility of those who make policy rather than to establish individual responsibility for the implementation of decisions taken. Especially as in many instances we will not know until after the event what the effect and unintended consequences of policy initiatives will be, the review and monitoring of the impact of policy is essential. At present, certainly in the penal and criminal justice systems, it appears that too often key decisions in one area are taken by unelected and unaccountable civil servants in ignorance of relevant information and without regard to the possible impact in another.

What is needed, therefore, is a separate and independent policy making body, in which the different policy requirements, priorities and interests of the various criminal justice, welfare and penal institutions would be represented. Such a body must be flexible in its policy making and fully representative of and sensitive to the competing interests both of those working within and of those served by the different institutions. For of two

things we can be sure. First, interests and priorities change over time, sometimes very rapidly. Secondly, in circumstances where resources are scarce and objectives essentially contestable, we can expect dissensus rather consensus as between and within the different agencies involved, and the "consumers" of their services.

In relation to the prisons, one possible option would be to establish a Scottish Sentencing Commission, similar, for example, to those established recently in the states of Minnesota, Washington and Pennsylvania. Professor Andrew von Hirsch, for example, argues in his recent book *Past or Future Crimes*, that experience in the United States suggests that legislatures, judiciary and parole boards had proved singularly ineffective at elaborating effective sentencing principles:

Legislatures when writing specific norms for sentencing have tended to become embroiled in law-and-order politics. The judiciary, when willing to draft sentencing standards at all, has been wont to rely on past sentencing practice and to avoid controversial issues of policy. Parole boards have occasionally drafted coherent standards for parole release decisions but cannot regulate judge's decisions about whether or not to imprison.<sup>(15)</sup>

There would seem more than a passing resemblance to the problems we face in Scotland. In von Hirsch's model, the Sentencing Commission is composed of a "small number of members, nominated by the jurisdiction's chief executive, and backed by a full-time professional staff". Such a commission would prescribe guidelines for sentences, which judges would ordinarily be required to observe, from which any departures would be subject to appellate review. These guidelines, von Hirsch argues "would be prescriptive, not merely reflective of past sentencing practice." But the commission's main function "would be to make considered, explicit policy decisions about what the basis of sentencing ought to be".

This is, as we have seen, an enormous task. In the present Scottish context, in order to determine what the objectives of sentencing ought to be, a Sentencing Commission would necessarily have to review, on a continuing basis, the provision and use of resources – in social work, prosecution and police as much as in the prisons themselves. Thus, alongside guidelines on both custodial and non-custodial sentencing, at the very least the Commission would be expected to lay down guidelines as to the nature and purpose of different regimes and, for example, the role of rehabilitation in prison.

In principle, the setting up of a Scottish Sentencing Commission along such lines would be an enormous step forward – and not one without precedent in jurisdictions of similar size, law and culture. There are many questions of detail and of principle that would have to be clarified. For

example, it is not exactly clear why, according to von Hirsch, a non-elective Commission – presumably in Scotland appointed by the Secretary of State – should be under less “pressure to adopt posturing stances of toughness”<sup>(16)</sup> than one at least in part appointed by or composed of elected members of, for example, local authorities.

This is of particular importance, of course, when the problem here is so much a question of local versus central government control of the prisons. Certainly, if prisons like the police were made the financial responsibility of local authorities one might expect a greater involvement of local representatives in policy formulation and review. This would seem sensible when, for example, one considers the nature of many of the recommendations of the recent inquiry on Peterhead, which covered such matters as the provision of physical education staff and support services, the maintenance of prison buildings, catering services, transport arrangements for visitors etc., all of which could usefully be undertaken at local level through local authority departments. It would also be likely that the effectiveness and credibility of the Prisons Inspectorate would be enhanced. For, as the Webbs pointed out:

When the power of and the responsibility for government is in one authority, and the inspectors are officers of another authority, a greater degree of impartiality, more fearless criticism, and a wider freedom of suggestion can be secured than is ever possible in practice when all the officers concerned – local administrators, inspectors and the office staff of the authority – are members of one and the same service, and, to a large extent, parts of a single official hierarchy.<sup>(17)</sup>

To conclude, I have not attempted in this article to cover the many particular questions of justice and injustice, of practice and principle which inform the current prisons debate. For those who wish to leaven the bread and water of official reports and committees of inquiry, I would recommend the recent reports of SACRO and SCCL<sup>(18)</sup>. Rather, I have tried to think politically and therefore, I hope, optimistically about the problems and to point out the underlying and perhaps less obvious features of the crisis we face.

These are the matters which, I believe, should properly be considered by a Royal Commission or, more realistically, its equivalent. I say “equivalent” because I am sufficiently pessimistic to believe that we will have a Scottish Assembly long before the present government allows a Royal Commission on Scottish Prisons. An Assembly, however, need not be pessimistic about the future of crime and punishment in Scotland. It is one more job that needs desperately to be done – but it is one which can be done.

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